12-14

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 229.

THE BROOKLYN CITY AND NEWTOWN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE NATIONAL BANK OF THE REPUBLIC OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 5, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 229.

THE BROOKLYN CITY AND NEWTOWN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE NATIONAL BANK OF THE REPUBLIC OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate	2	1
Capias	3	2
Narr	5	3
Appearance	13	5
Answer	15	5
Summons	20	7
Complaint	22	7
Amended answer	26	9
Reply	32	11
Order of reference	34	11
Referee's report	36	12
Judgment	41	13
Affidavit of service of papers	43	14
Transcript of judgment	45	15
Agreed statement of facts	47	15
Stipulation waiving jury	57	18
Opinion of Judge Wallace	59	18
Order for judgment	64	20
Judgment	66	20
Bond on appeal	69	21
Citation	73	23

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between the National Bank of the Republic, of New York, and the Brooklyn City & Newtown Railroad Company, a manifest error hath happened, to the great damage of the said The Brooklyn City and Newtown Railroad Company, as is said, and as appears by their complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States at the Capital, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this eleventh day of August, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the one hundred and second.

[SEAL.] JOHN I. DAVENPORT,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is allowed.
August 11, 1877.

SAM'L BLATCHFORD,
District Judge.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to seventy-four inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of the Brooklyn City and Newtown Railroad Company, plaintiff in error, against the National Bank of the Republic, of New York, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, the 4th day of October, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the said United States the one hundred and second.

[SEAL.] JOHN I. DAVENPORT,
Clerk.

(Indorsed:) U. S. Supreme Court. The Brooklyn City & Newtown Railroad Comp'y, plaintiff in error, against The National Bank of the Republic, of New York, defendant in error. Writ of error. Field & Deyo, att'ys for pl'ff in error, 4 Pine st., N. Y. U. S. circuit court. Filed Aug. 14, 1877. John I. Davenport, clerk.

3 *Capias.*

The President of the United States of America to the marshal of the southern district of New York, greeting:

We command you that you summon the Brooklyn City & Newtown Railroad Company, defendants, if they shall be found in your district, and them safely keep, so that you may have their bodies before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, to be held at the United States court & post-office building, in the city of New York, in the said southern district, on the 12th day of August next, to answer unto the National Bank of the Republic, of New York, plaintiff, in a plea of trespass; and also to a certain bill of the said plaintiff against the said defendant upon promises, to wit, for the sum of five thousand dollars, being the amount of a promissory note made by the defendant, dated May 9th, 1873, payable four months after date, to the order of William V. Le Count, treasurer, & by said William V. Le Count, treasurer, in writing endorsed and delivered to the plaintiff, according to the custom of the said court, before the said judges, then and there to be exhibited, and that you have then there this writ.

Witness the honorable *Hon.* Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of New York, the 5th day of August, in the year one thousand eight hundred and seventy-five, and of the Independence of the United States the ninety-

[L. S.] KENNETH G. WHITE,
Clerk.

RODMAN & ADAMS,
Attorneys.

4 I hereby certify that on the 10th day of August, 1875, at the city of New York, in my district, I personally served the within capias upon the within-named Brooklyn City and Newtown Railroad Company by exhibiting to William V. Le Count, treasurer of said company, the within original, and at the same time leaving with him a copy thereof.

Dated August 10, 1875.

OLIVER FISKE,
U. S. Marshal S. D. N. Y.

G. H. H.

U. S. circuit court for the southern district of New York.

THE NATIONAL BANK OF THE REPUBLIC, OF New York,
vs.
THE BROOKLYN CITY & NEWTOWN RAILROAD Company.

Capias ret. Aug. 12, 1875.

RODMAN & ADAMS,
Att'ys.

Filed Aug. 10, 1875.

5 Circuit court of the United States for the second circuit and southern district of New York.

THE NATIONAL BANK OF THE REPUBLIC, OF New York,
vs.
THE BROOKLYN CITY & NEWTOWN RAILroad Company.

The above named plaintiff comes here into this court and by Rodman & Adams, its attorneys, complains of the defendant of a plea of trespass on the case, for that whereas heretofore, to wit, on or about the ninth day of May, in the year of our Lord one thousand eight hundred and seventy-three, at the city of New York, aforesaid, the said plaintiff was and is a citizen of the State of New York and was and is a banking association created under the act of Congress of the United States entitled "An act to provide a national currency secured by a pledge of United States stocks and to provide for the circulation & redemption thereof," passed February 26, 1863, and the several acts of Congress amendatory thereof and supplementary thereto, with all the pow-
6 ers and privileges conferred by said acts upon such banking associations, and was then, to wit, on the day and year last aforesaid, at the place aforesaid, established and doing business as such banking association at the place aforesaid and within the said southern district of New York; and the said defendant was, at the date and place aforesaid, and is a citizen of the State of New York, and was and is a corporation created under the laws of the said State, with power to operate a railroad within said State, and also to borrow money and issue bonds, promissory notes, and other evidences of debt to secure the payment thereof.

That the said defendant at the date and place aforesaid, and within the said southern district of New York, did make and issue a certain note in writing, commonly called a promissory note, bearing date the ninth day of May, one thousand eight hundred and seventy-three, whereby the said defendant promised, for value received, to pay, four months after the date thereof, to the order of William V. Le Count, the treasurer of said
7 defendant, the sum of five thousand dollars, lawful money of the United States, at the Atlantic State Bank, Brooklyn; and then and there the said defendant, as such corporation, delivered the said promissory note to the said William V. Le Count, treasurer as aforesaid, and the said William V. Le Count, as such treasurer as aforesaid, by authority of the defendant afterwards and before the payment of the said sum of money mentioned in the said note, and also before the maturity thereof, to wit, on the day and year and at the place aforesaid, endorsed in blank the said note, in writing, as such treasurer as aforesaid, for value received, and then and there delivered the said note so endorsed to the paintiff, of which endorsement, so made thereon as aforesaid, the said defendant afterwards, to wit, on the same day & year and at the place aforesaid, had notice.

By reason whereof, and by force of the statute of the State of New York in such case made and provided, the said defendant became liable to pay to the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of the said note and of the endorsement thereof as aforesaid, and being so liable,
8 the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and faithfully promised the said plaintiff well and truly to pay to the plaint-

iff the said sum of money in the said note specified according to the tenor and effect thereof and of the said endorsement so thereon made as aforesaid.

And whereas, also, the said defendant afterwards, to wit, on the ninth day of May, one thousand eight hundred and seventy-three, at the said city of New York, and within the southern district aforesaid, was indebted to the said plaintiff in the sum of six thousand dollars, lawful money of the United States, for so much money before that time lent and advanced by the said plaintiff to the said defendant, and at the special instance and request of the said defendant; and being so indebted the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, and at the place aforesaid, undertook & then & there faithfully promised the said plaintiff well
9 and truly to pay to the plaintiff the said sum of money when the said defendant should be thereunto requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, was indebted to the said plaintiff in the further sum of six thousand dollars, like lawful money as aforesaid, for so much money before that time paid, laid out, & expended by the said plaintiff to and for the use of the said defendant, and at the like special instance and request of the said defendant, and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last above mentioned when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on
10 the same day and year last aforesaid, and at the place aforesaid, was indebted to the said plaintiff in the further sum of six thousand dollars, like lawful money as aforesaid, for so much money before that time had and received by the said defendant to and for the use of the said plaintiff, and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and there and then faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last above mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant (although often afterwards requested, &c.) hath not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but the same, or any or either of them, or any part thereof, to the said plaintiff to pay the said defendant hath hitherto wholly refused,
11 and still doth refuse, to the damage of the said plaintiff of six thousand dollars, and therefore the said plaintiff brings suit.

RODMAN & ADAMS,
Attorneys.

To the Brooklyn City and Newtown Railroad Company:

You will please to take notice that this suit is brought against you as the maker of a promissory note of which the following is a copy:

BROOKLYN, *May 9th*, 1873.

$5 000.

Four months after date we promise to pay to the order of Wm. V. Le

Count, treasurer, five thousand $\frac{00}{100}$ dollars at the Atlantic State Bank, Brooklyn, value received.

THE BROOKLYN CITY & NEWTON RAILROAD CO.,
By THOS. PALMER, JR.,
President.

Due Sept. 12th.
(Endorsed:) Wm. V. Le Count, treasurer.

And the same will be given in evidence against you, to enable the plaintiff to recover on the within declaration.

Dated New York, Aug. 24, 1875.

Yours, &c.,

RODMAN & ADAMS,
Pl'ff's Att'ys.

(Endorsed:) U. S. circuit court. The National Bank of the
12 Republic, of New York, vs. The Brooklyn City and Newton Railroad Company. Narr. Rodman & Adams, pl'ff's att'ys. Filed Aug. 25, 1875.

13 U. S. circuit court, southern district of New York.

THE NATIONAL BANK OF THE REPUBLIC, OF New York,
ag'st
THE BROOKLYN CITY & NEWTOWN RAILROAD Company.

Take notice that we hereby appear for the defendant herein, and enter our appearance accordingly.

New York, Aug. 12th, 1875.

Yours, &c.,

FIELD & DEYO,
4 Pine St., N. Y., Def'ts Att'ys.

To KENNETH G. WHITE, Esq., *Clerk, &c.*
RODMAN & ADAMS, *Pl'ff's Att'ys.*

(Endorsed:) U. S. circuit court, southern district of N. Y. The National Bank of the Republic, of New York, ag'st The Brooklyn
14 City & Newtown Railroad Company. Appearance for def't. Field & Deyo, 4 Pine St., N. Y., def't's att'ys. Filed Aug. 12, 1875.

15 Circuit court of the United States, southern district of New York.

THE NATIONAL BANK OF THE REPUBLIC, OF New York,
against
THE BROOKLYN CITY AND NEWTOWN RAILroad Company.

The Brooklyn City & Newtown Railroad Company, defendants, answer to the complaint:

First. They admit that the plaintiffs and the defendants are corporations, as set forth in the complaint, & they deny each and every other allegation in the complaint contained, except as hereinafter set forth.

Second. They allege that the note referred to in the complaint was

made and endorsed without consideration, & was delivered to a firm named Hutchinson & Ingersoll, without consideration, for the purpose of having the same sold by them in the market for the account of the defendants, upon the express understanding and agreement that it should not leave the possession of the said firm, be sold without the knowledge & consent of the defendants, & that after it should be sold the proceeds should be paid over to them.

16 Third. They allege that at the time of the delivery of the said note to the said firm the defendant was indebted to the said firm in the sum of $2,500, which was loaned by it to them on the 24th day of April, 1873, & in the further sum of $3,000, which was loaned to them on the 7th day of May, 1873; and that subsequently, on the 7th day of June, 1873, they borrowed from said firm the further sum of $4,000, which three sums comprised their entire indebtedness to said firm; that they paid on account of the said indebtedness to the said firm on the 22nd day of June, 1873, the sum of $4,850, & on the 8th day of August, 1873, the further sum of $4,460, & that on the 1st day of September, 1873, the defendants were indebted to the said firm in the sum of $601, & no more, which sum included interest.

Fourth. They allege that on or about the 15th day of August, 1873, they duly tendered to said firm the sum of $601, being more than the amount due, with interest, in lawful-tender notes of the United States, & demanded a return of the said note, but the said firm neglected

17 to return the same, & they allege that they have been at all times ready & willing, and have frequently offered, to pay the said sum of $601, with the interest due thereof, & that they have paid the same with interest in full.

Fifth. They allege that the said firm, without the knowledge or consent of the defendants, delivered the said note, with other notes, to the plaintiffs without consideration, & only as collateral to a certain indebtedness of the said firm to the plaintiffs, which indebtedness amounted to the sum of $36,000, and no more, & arose upon a loan from the plaintiff to said firm of that sum on the 19th day of June, 1873, and that said loan was paid off and discharged in full with interest before the commencement of this suit, and before the commencement of the suit hereinafter mentioned, & that the plaintiffs then ceased to have any interest or property therein if they had ever acquired any right thereto, which the defendants deny.

And for a further & separate defence: That the plaintiffs heretofore, & on or about the 23rd day of November, 1874, brought an action in the supreme court of the State of New York, & within the city

18 & county of New York, against Thomas Palmer, jr., & Anson S. Palmer, as endorsers of the note sued upon herein. That in their defence thereto the said Thomas Palmer & Anson S. Palmer, who had acted only as agents for these defendants, set up the same defence as that hereinbefore set up, & offered to pay the said sum of $601, with interest & costs. That such proceedings were thereafter had in the said action that it was referred to the honorable Murray Hoffman, as referee, and was tried before him upon its merits, not upon any defence of the endorsers, as such, but upon the right of the plaintiffs to recover at all upon said notes, except for the sum of $601, and with interest. That a decision was had therein and a judgment rendered, whereby it was decided that the only amount due upon said note was the sum of $601, with interest, and judgment was finally entered in said action in favor of the plaintiffs & against said Thomas Palmer, jr., & Anson S. Palmer, for the sum of 707\frac{18}{100}$, being the amount aforesaid with

19 interest & costs, & that the said sum, with interest thereon, was paid in full on or about the 15th day of June, 1875, & the said judgment was, by the plaintiffs, duly satisfied of record, which judgment, and the satisfaction thereof, these defendants claim is a bar and defence to this action, and to any action upon the note sued upon herein.

FIELD & DEYO,
Def'ts' Att'ys.

(Endorsed:) Circuit court of the U. S., southern district of N. Y. The National Bank of the Republic, of New York, ag'st The Brooklyn City & Newtown Railroad Co. Answer. Field & Deyo, def'ts' atty's, 4 Pine st., N. Y. Original. Filed Sept. 13, 1875.

20 *Summons for a money demand on contract.*

STATE OF NEW YORK:

Supreme Court.

THE NATIONAL BANK OF THE REPUBLIC, OF New York, plaintiff,
against
THOMAS PALMER, JR., & ANSON S. PALMER, defendants.

To the defendants and each of you:

You are hereby summoned and required to answer the complaint in this action, of which a copy is hereto served upon you, and to serve a copy of your answer to the said complaint on the subscribers at their office, number 59 Liberty street, in the city of New York, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will take judgment against you for the sum of five thousand and one dollars and thirty-six cents, with interest from the 12th day of September, one thousand eight hundred and sev-
21 enty-three, on $5,000 thereof, besides the costs of this action.

Dated New York, Nov. 21, 1874.

RODMAN & ADAMS,
Plaintiff's Attorneys.

22 Supreme Court.

THE NATIONAL BANK OF THE REPUBLIC, OF New York, plaintiff,
vs.
THOMAS PALMER, J'R, AND ANSON S. PALMER, defendants.

City and county of New York, place of trial.

The complaint of the above named plaintiff against the above named defendants respectfully shows:

That at the times hereinafter mentioned said plaintiff was and still is a corporation duly organized and existing under the laws of this State and of the United States, and the above named defendants were and

still are partners in business at the city of New York under the firm name of Palmer & Co.

That on or about the 9th day of May, 1873, at Brooklyn, State of New York, the Brooklyn City and Newtown Railroad Company, a corporation of this State, made its certain promissory note in writing, dated the said 9th day of May, 1873, whereby said company promised to pay, four months after said date, to the order of Wm. V. Le Count, treasurer, five thousand dollars, at the Atlantic State Bank, Brooklyn, for value received, and thereupon delivered the same to said payee,
23 who endorsed the same in blank and transferred and delivered the same before maturity to the said defendants' firm, and that said defendants thereupon endorsed the said note in blank in their said firm name, and said note thereafter, in the due course of business, before maturity, and for full value, came into the possession of the plaintiff, which ever since has been and is now the lawful owner and holder thereof.

The plaintiff further shows that when said note became due and payable, to wit, on the 12th day of September, 1874, the same was duly presented for payment, at the place in said note designated therefor, and payment thereof demanded, but refused, whereupon the same was duly protested for non-payment, due notice whereof was given to said defendants, and the protest fees, amounting to one $\frac{36}{100}$ dollars, were paid by this plaintiff. That said note and said protest fees still remain wholly unpaid, and said defendants are justly indebted to the plaintiff in the amount of said note, viz, the sum of five thousand dollars,
24 with interest thereon from the 12th day of September, 1873, besides $1.36, said notary's fees of protest.

Wherefor' the plaintiff demands judgment against the defendants in this action for the sum of five thousand and one $\frac{36}{100}$ dollars, with interest as aforesaid, besides costs of this action.

RODMAN & ADAMS,
Pl'ff's Atty's.

CITY & COUNTY OF NEW YORK, *ss:*

Henry H. Ford, being duly sworn, says he is the cashier of the National Bank of the Republic, of New York, the plaintiff named in and making the foregoing complaint, and that said complaint is true of deponent's own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

H. W. FORD.

Sworn to before me this 21st day of Nov., 1874.

NATH'L B. COOKE,
Notary Public, Kings' Co., N. Y.

Five days' further time to answer, issue to be of 13th Dec'r.

RODMAN & ADAMS,
Pl'ff's Att'ys.

(Endorsed:)

The time for the defendants to answer is hereby extended thirty
25 days from December 12th, 1874; issue to be of date when answer was originally due; def'ts to accept notice of trial for January, 1875.

New York, Dec. 11th, 1874.

RODMAN & ADAMS,
Pl'ff's Att'ys.

Supreme court. The National Bank of the Republic, of New York, vs. Thomas Palmer, j'r, & al. Copy. Summons. Complaint.

26 *Amended answer.*

Supreme court.

THE NATIONAL BANK OF THE REPUBLIC
ag'st
THOMAS PALMER, J'R, & ANSON S. PALMER.

Thomas Palmer, j'r, & Anson S. Palmer, the defendants, make an amended answer to the complaint, as follows:

For a first defence:

First. They deny that the note described in the complaint in the due course of business, for value, came into the possession of the plaintiffs, and they deny that the plaintiffs ever have been or are now the lawful holders or owners thereof, & they deny that the said note remains wholly unpaid, & they deny that they are indebted to the plaintiffs thereon in any sum whatever.

Second. They allege that the said note was made by the Brooklyn City & Newtown Railroad Company & endorsed by William V. Le Count, the treasurer thereof, & delivered to these defendants wholly without consideration, & for the sole purpose of enabling these defendants
27 to place the same with a firm known by the name of Hutchinson & Ingersoll, to be sold by them in the market for the account of the said corporation. That the defendants endorsed the said note and delivered it to the said firm without consideration, and entrusted it to them to sell as aforesaid, & upon the express understanding and agreement between the said corporation and said firm that the said note should not leave the possession of the said firm or be sold without the knowledge & consent of the defendants or the said corporation.

Third. They allege that at the time of the delivery of said note to the said firm the said corporation was indebted to the said firm in the sum of $2,500, which was loaned to them on the 24th day of April, 1873, and the further sum of $3,000, which was loaned to them on the 7th day of May, 1873, & that subsequently & on the 7th day of June, 1873, they borrowed from said firm the further sum of $4,000, which three sums comprised their entire indebtedness to said firm.

Fourth. They allege that the said corporation paid or caused to be paid on account of the said indebtedness to the said firm, on the
28 22nd day of June, 1873, the sum of $4,580, & on the 8th day of August, 1873, the further sum of 4,460, & that on the 1st day of September, 1873, the said corporation were indebted to said firm in the sum of $601, & no more, which sum included interest.

Fifth. They allege that on or about the fifteenth day of August, 1873, the said corporation & these defendants duly tendered to said firm the sum then due, being a little less than $601, with interest, in lawful tender notes of the United States, & demanded a return of said note, but the said firm neglected to return the same, & they allege that the said company & these defendants have been at all times & are now ready & willing to pay the said sum of $601, with the interest due thereon, and they hereby offer to pay the same upon receipt of said note.

Sixth. They allege that the said firm, without the knowledge or consent of the said Brooklyn City & Newtown Railroad Company, or of the said Le Count, or of these defendants, delivered the said note,

29 with other collaterals, to the plaintiffs without consideration, & only as collateral to certain indebtedness from the said firm to the plaintiffs, which indebtedness amounted to the sum of $36,000, & no more, and was made on the 19th day of June, 1873, and they allege that the said loan was afterward and long before the commencement of this suit paid in full, with interest, by the said firm to the plaintiffs.

Seventh. They allege, upon information & belief, that the plaintiffs had notice when they acquired possession of the said note of all the facts hereinbefore alleged, except the fact of the payment of said loan, which was made after they received the said note.

Eighth. That on or about the 7th day of September, 1873, and at divers other times, the said corporation and these defendants duly offered to pay to the plaintiffs the $601, as aforesaid, & the interest thereon, and demanded a return of the said note, but the plaint-

30 iffs refused to accept the said money or to return the said note.

And for a further & separate & second defence:

First. That all the statements set forth in the first answer are true.

Second. That Morton P. Hutchinson & Samuel Ingersoll, composing the firm of Hutchinson & Ingersoll, are alive, & that both they & said corporation are within the jurisdiction of this court, and that the said firm & said corporation are necessary & proper parties defendants herein.

And for a further & separate & third defence and as a counter claim to the claim set up in the plaintiff's complaint: That the statements set forth in the first answer are true.

Wherefore they demand that the said note shall be delivered up to them to be canceled, they hereby tendering & offering to pay the sum of $601 aforesaid with interest.

FIELD & DEYO,
Def'ts' Att'ys.

CITY & COUNTY OF NEW YORK, *ss:*

Anson S. Palmer, one of the defendants herein, being duly sworn, says that the foregoing amended answer is true to his own knowl-

31 edge except as to the matters which are therein stated upon information and belief, and that as to those matters he believes it to be true.

ANSON S. PALMER.

Sworn to before me this 8th day of February, 1875.

WILLIAM MALLOY,
Notary Public, Kings County, N. Y.

(Endorsed:) Supreme Court. The National Bank of the Republic against Thomas Palmer, jr., and Anson S. Palmer. Amended answer. Field & Deyo, attorneys for def'ts, 4 Pine street, New York.

Due service of a copy of the within amended answer is hereby admitted.

N. Y., Feb'y 8th, 1875.

RODMAN & ADAMS,
Pl'ff's Att'ys.

32 The supreme court.

THE NATIONAL BANK OF THE REPUBLIC, OF New York, plaintiff,
against
THOMAS PALMER, JR., AND ANSON S. PALMER, defendants.

The plaintiff, for reply to so much of the defendants' answer in the above-entitled action as avers a counter claim herein, denies each and every allegation thereof.

Wherefore the plaintiff renews the prayer of its complaint.

RODMAN & ADAMS,
Plaintiff's Attorneys.

STATE, CITY & COUNTY OF NEW YORK, *ss:*

Henry W. Ford, of said city, being duly sworn, says that he is the cashier of the plaintiff in the foregoing reply named; that said reply is true of deponent's own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

H. W. FORD.

Sworn before me January 20th, 1875.

NATH'L B. COOKE,
Notary Public, Kings Co., N. Y.

33 (Endorsed:) Supreme court. The National Bank of the Republic, &c., vs. Thomas Palmer, jr., & als. Copy. Reply. Rodman & Adams, pl'ff's att'ys, 59 Liberty street, N. Y. Field & Deyo esq's, 4 Pine st.

34 At a special term of the supreme court of the State of New York, held at the court-house, in the city of New York, on the 25th day of March, 1875.

Present, Hon. Charles Donohue, justice.

THE NATIONAL BANK OF THE REPUBLIC, OF New York,
against
THOMAS PALMER, JR., AND ANSON S. PALMER.

On reading & filing the consent to the entry of this order, signed by the attorneys for the respective parties herein, and on motion of Field & Deyo, attorneys for the defendants, it is ordered that this action be, and the same is hereby, referred to Hon. Murray Hoffman, counsellor at law, as sole referee to hear and determine all the issues therein.

A copy.

WM. WALSH, *Clk.*

35 (Endorsed:) Supreme court. The Nat'l B'k of the Republic vs. Thomas Palmer, jr., & al. Copy. Order of ref'ce entered Mar. 25, '75. Field & Deyo, def'ts' att'ys.

36 *Report.*

Supreme court.

THE NATIONAL BANK OF THE REPUBLIC, OF New York,
ag'st
THOMAS PALMER, JR., AND ANSON S. PALMER.

To the justices of the supreme court:

In pursuance of an order of this court made in the above cause and dated the 25th day of March, in the year 1875, I, the referee therein named, do report:

That I have been attended on behalf of the said parties plaintiff and defendant herein, and having heard their allegations and proofs, I find the following facts:

That the promissory note mentioned in the complaint in this cause was duly executed and endorsed as therein set forth.

That the same was made by the Brooklyn City and Newtown Railroad Company, and was indorsed by the defendants, partners in trade, in their firm name, for the purpose of obtaining money thereon for the use of such company, and for no other purpose or consideration, and that the defendants were officers of such company at and before
37 the execution and endorsement of the same, and have so continued.

That such note with two other notes previously made by the said company were delivered to the firm of Hutchinson and Ingersoll, bill brokers, in the city of New York, for the purpose of raising money for the use of such company, and for no other purpose and upon no consideration given by such firm therefor.

That such three notes amounted together to the sum of fourteen thousand and forty dollars, and that such firm on the pledge of or by means thereof advanced or loaned to the said railroad company and for its use the sum of nine thousand five hundred dollars before and on the 7th of June, 1873.

That upon these transactions the said railroad company, having paid the first two notes, became indebted to the said Hutchinson and Ingersoll on the 8th day of August, 1873, in less than $600, & with an interest account stated in the sum of six hundred and one dollars, which includes interest on September 1st, 1873, and had a lien upon
38 such note, and a claim against the defendants as indorsers to that amount and no more.

That on or about the 19th of June, 1873, the said Hutchinson and Ingersoll borrowed from the plaintiffs the sum of thirty-six thousand dollars, being a loan on call, and deposited with such plaintiffs various securities amounting to the nominal sum of forty-three thousand nine hundred and sixty-six dollars, and among them the said three promissory notes made by the said railroad company, and one of which, viz, the note in suit, was indorsed by the defendants.

That by the 4th day of April, 1874, the whole of such loan of thirty-six thousand dollars with the interest was fully paid and discharged out of collections made upon the collateral securities deposited other than the note in suit of five thousand dollars, and leaving a debt due from the bank to the said firm on the account of such loan separately of the sum of two thousand three hundred and seventy-three dollars.

39 That on the 11th of July, 1873, the said plaintiffs made a further loan to such firm of Hutchinson and Ingersoll of the sum of ten thousand dollars on call, and upon a specific deposit with them of four other promissory notes as collateral for the same, amounting to the sum of $11,612.62.

That one of such notes was surrendered upon a substituted note therefor, and that only one of such notes was paid, and a balance became and is due to the plaintiffs on such loan, separately considered, of over seven thousand eight hundred dollars.

That the whole debt of the firm of Hutchinson and Ingersoll to the plaintiffs arising out of the two loans hereinbefore stated was on the 4th day of April, 1874, the sum of four thousand nine hundred and eighty-three dollars $\frac{36}{100}$.

That there was not at the time of such loan of ten thousand dollars on the 11th of July, 1873, nor at any time, any agreement, direction, or claim and acquiescence between or by the parties by which the note in suit was to be held or looked to for security of such loan or any
40 part thereof.

And I further find as conclusions of law:

That the plaintiffs are entitled to judgment against the defendants for the sum of six hundred & one dollars, with interest from September 1st, 1873, & the sum of one dollar & thirty-six cents, protest, with interest from September 12th, 1873, being together the sum of six hundred & seventy-two dollars & sixty-three cents.

New York, April 30, 1875.

MURRAY HOFFMAN,
Referee.

(Endorsed:) N. Y. supreme court. The National Bank of the Republic ag'st Thomas Palmer, jr., & als. Copy referee's report.

41 *Judgment.*

Supreme court.

THE NATIONAL BANK OF THE REPUBLIC, OF New York, plaintiff, *vs.* THOMAS PALMER, JR., AND ANSON S. PALMER, defendants. } June, 1875.

This action having been *only* referred to Hon. Murray Hoffman, counsellor a tlaw, as sole referee, to hear and determine all the issues therein, by an order of this court dated the 25th day of March, 1875; and the referee having duly made and rendered his report therein, dated April 30th, 1875, and hereto annexed, whereby he finds in favor of the plaintiff against the defendants for the sum of six hundred and one dollars with interest thereon from Sept. 1st, 1873, and one dollar and thirty-six cents protest with interest *for* Sept. 12th, 1873, being together the sum of six hundred and seventy-two dollars and sixty-three cents, and the defendants have, by offer in writing made March 11th, 1875, offered to allow the plaintiff to take judgment against them for said sum of
42 $601, with interest from said 1st September, 1873, & said $1.36 fees of protest with interest from said 12th Sept., 1873, with costs, and the plaintiff not having accepted such offer:

Now, on motion of Rodman & Adams, plaintiff's attorneys, it is ordered & adjudged that said plaintiff do have & recover judgment in this action against said defendants for the sum of six hundred & seventy-two $\frac{63}{100}$ dollars (672.63) amount, fees of protest & interest as found

by said referee, besides seventy-four dollars & fifty-five cents (74.55) costs to the time of such offer & interest, making the sum of seven hundred and forty-seven dollars and eighteen cents (747.18), less the sum of forty dollars (40) costs in favor of the defendants since such offer as taxed, being judgment in favor of said plaintiffs against the defendants herein for the sum of seven hundred and seven dollars and eighteen cents (707.18), and that said plaintiff have execution therefor.

43 U. S. circuit court, second circuit, southern district of New York.

THE NATIONAL BANK OF THE REPUBLIC, OF New York,
ag'st
THE BROOKLYN CITY & NEWTOWN RAILROAD Company.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Chas. T. Bauerdorf, being duly sworn, says that on the 23rd day of November, 1876, he compared the foregoing papers composing the judgment roll in the case of The National Bank of the Republic, of New York, against Thomas Palmer, jr., and Anson S. Palmer, with the original judgment roll on file in the office of the city and county of New York, and that the same is a true and correct copy of such judgment roll.

CHAS. F. BAUERDORF.

Sworn & subscribed to before me this 24th November, 1876.
WILLIAM MALLOY,
Notary Public, Kings County, New York.

44 (Endorsed:) Supreme court. The National Bank of the Republic, of New York, ag'st Thomas Palmer, jr., and Anson S. Palmer. Judgment roll. Rodman & Adams, pl'ff's att'ys.

Report	672 63
Costs & interest	74 55
	747 18
Def'ts' costs	40
	707 18

Filed June 8, 1875—11 h. 6 m.

Against whom.	In whose favor.
Palmer, Thomas, jr. Palmer, Anson S.	The National Bank of the Republic, of New York.

Where perfected.	When perfected.	H. M.	Transcript filed.	H. M.	Amount. Debt, damages, and costs.	Attorney.	When satisfied.
N. Y. Supreme.	1875. June 8; 11, 116.				$707 18	Rodman & Adams.	July 27th, 1875.

COUNTY CLERK'S OFFICE,
City and County of New York, ss:

I, William Walsh, clerk of the city and county of New York, certify that the above is a true and correct copy extract from the docket of transcript kept in my office. And I also certify that the above judgment is satisfied of record.

In testimony whereof I have hereunto set my name and affixed my official seal this 27th day of July, 1875.

[NEW YORK SEAL.] WM. WALSH, *Clerk.*
W. E. L.

46 (Indorsed:) County clerk's office. New York. National Bank of the Republic ag'st Thomas Palmer, jr., & Anson S. Palmer. Certificate of satisfaction.

47 United States circuit court, 2d circuit and southern district of New York.

THE NATIONAL BANK OF THE REPUBLIC, OF New York, plaintiff,
against
THE BROOKLYN CITY AND NEWTOWN RAILroad Company, defendants.

Cause submitted by consent to the honorable William J. Wallace, judge of the above court, without a jury, at the circuit of said court held at the city of New York, in the district above named, on the first day of December, 1876, upon the pleadings, the admissions therein contained, and the following statement of facts, which are agreed upon for the purpose for this submission and trial.

At all the times hereinafter mentioned Thomas Palmer, jr., and Anson S. Palmer composed the partnership firm of Palmer & Co. at the city of New York.

Thomas Palmer, jr., was the president, and Anson S. Palmer was the financial agent, of the defendant, The Brooklyn City and Newtown Railroad Company, and the said Palmers owned the larger portion of
48 the stock of the company, and were its principal managers. William V. Le Count was its treasurer.

On the 9th May, 1873, the company made the note set forth in the declaration herein. Le Count endorsed it. The note and said endorsement are in terms set forth in the copy annexed to the declaration; and thereupon said Palmers also endorsed the note in blank in their said firm name of Palmer & Co., the said note being so made and endorsed for the purpose of raising money thereon for the use of the company, and said Le Count and Palmer & Co. receiving no consideration for their endorsement. Thereupon the company placed the note with others in the hands of Hutchinson and Ingersoll, a firm of note brokers in Wall street, New York City, for sale.

Prior to the date of said note Hutchinson and Ingersoll had frequently borrowed money from the plaintiff, but did not keep a bank account with them, and had no other transactions with them than those hereinafter set forth. * * * * .

In the month of October, 1872, the plaintiff first made them a call loan, at seven per cent. interest, of $25,000 on collaterals. All the
49 loans hereinafter mentioned were also made to Hutchinson & Ingersoll by the plaintiff as call loans on collaterals, and at such

rate of interest. The various loans so made by the plaintiff are as follows:

1872.	October	$25,000
1873.	March 11	15,000
"	" 15	10,000
"	April 11	10,000
"	May 16	10,000
"	" 20	20,000
"	" 23	10,000
"	June 4	15,000
"	" 6	12,000
"	" 12	10,000
"	" 19	36,000
"	July 11	10,000

Each of these loans was a separate one and had no reference to any other loan, and was made upon a particular and separate lot of collaterals. Hutchinson and Ingersoll were in the habit of borrowing from various banks and from individuals or firms specific sums of money upon specific lots of collaterals.

On the 19th June, 1873, when Hutchinson and Ingersoll came to borrow the $36,000, all the previous loans had been paid off. The
50 $36,000 were loaned by the plaintiff upon several notes given by Hutchison and Ingersoll as collateral, among which notes was the note in suit in this action.

On the 11th July, 1873, the plaintiff loaned $10,000 to Hutchison & Ingersoll on the following notes as collateral:

Howes, Hyatt & Co	$2,605 98
Do.	3,540 15
H. L. Ritch & Co	3,320 17
Do.	2,146 92

On the 22d July, 1873, Howes, Hyatt & Co. having openly failed in business and become notoriously bankrupt, all which was known to the plaintiff, Hutchison and Ingersoll executed and delivered to the plaintiff at its request the instrument in writing of which a copy is hereto annexed marked Exhibit A, and which was antedated to the date of the loan of $36,000 on said 19th June, 1873; but no agreement was made to extend the loan or to refrain from calling it in.

The plaintiff knew that Hutchison and Ingersoll were note brokers, but until August 8, 1873, had no notice, knowledge, or information as to the connection of the Palmers with the defendant or as to any
51 of the circumstances attending the making or endorsement of the note in suit, or the purpose thereof, or of any relations, dealings or communication between Hutchison and Ingersoll and the parties to the said note (except that they knew that Hutchison & Ingersoll were note brokers), or that it was anything else than ordinary business paper, or that there was any question as to the right of said Hutchison & Ingersoll to hypothecate it; nor did the defendant know or suspect that the said firm had parted with or hypothecated the said note until August 15, 1873.

The defendant, by reason of certain advances made by Hutchison and Ingersoll, became indebted to them in the sum of about $600 on the 8th day of August, 1873, and on the 15th day of said August the defendant tendered the sum due to the said firm and demanded a return of the note in question; and during the same month also made a like tender to the plaintiff and a demand of the note.

The $36,000 loan was paid in full out of the collaterals given to secure its payment, as they matured, without resorting to the note in
52 suit, the first payment of $4,580 being July 22, 1873, & the last payment being April 4th, 1874, and leaving the said note in the plaintiff's possession.

Hutchison and Ingersoll are insolvent. The collaterals collected exceeded the loan of $36,000 by $2,403.61, so that the entire balance due from Hutchison and Ingersoll to the plaintiff on the 4th April, 1874, including interest, was $5,906.99, due upon the $10,000 loan.

On account of the $10,000 loan of July 11th, 1873, by the plaintiff to Hutchison and Ingersoll, there is a balance due the plaintiff Nov. 21, 1876, of $5,136.68 after exhausting all the collaterals in the plaintiff's hands pledged to secure that loan on the 11th July, 1873, and crediting the amount of the judgment with interest collected, as hereinafter mentioned.

The plaintiff sued Palmer & Co. as endorsers upon the note in suit in the supreme court of the State of New York. The action was referred to Murray Hoffman. He rendered judgment in favor of the plaint-
53 iff for $601. The amount, with costs, was paid and the judgment was satisfied. The judgment roll and the report of the referee and the satisfaction piece are submitted herewith.

If the court shall hold that the defendant is liable to the plaintiff upon this note, the amount will be as of Nov. 21, 1876, $5,136.68.

New York, Dec'r 1st, 1876.

FIELD & DEYO,
Def'ts' Att'ys.
RODMAN & ADAMS,
Pl'ff's Attys.

54 This agreement, made and dated this 19th day of June, one thousand eight hundred and seventy-three, witnesseth that we, Hutchison and Ingersoll, hereby agree with the National Bank of the Republic, of New York, that all securities, bonds, stocks, things in action, or other property or evidences of property whatsoever which have been or may at any time hereafter be deposited or left by us or on our account with said bank, whether specifically pledged or not, may be held by said bank, and shall be deemed to be and are hereby pledged as security for the payment of any and every indebtedness, liability, or engagement on our part held by said bank, and that on the non-payment, when due and payable, of any sum or sums of money which have been or may hereafter be by said bank lent, paid, or advanced to or for the account or use of us, or for which we are or may become in any way liable or indebted to said bank, the said bank, or its president or cashier, may immediately thereupon, or at any time there-
55 after, sell or cause to be sold and assign and deliver the whole or any part of such securities, bonds, stocks, things in action, property, or evidences of property, at any brokers' board, or at public auction or private sale, at the option of said bank or its president or cashier, and without advertising or giving to us any notice, or making any demand of payment, and apply the net proceeds of sale to the payment of any sum or sums due and payable from us to said bank, and hold any surplus of such net proceeds, together with any and all remaining securities, property, or evidences of property, then held by said bank

and not sold, as security for the payment of any and all other of our then existing and remaining liabilities and engagements to said bank.

HUTCHISON AND INGERSOLL.

Witness:
H. W. FORD.
Exhibit A.

(Endorsed:) U. S. circuit court, southern district of New York.
56 The National Bank of the Republic, of New York, vs. The Brooklyn City & Newtown Railroad Co. Statement for submission. Rodman & Adams, pl'ff's atty's. Field & Deyo, def'ts' atty's.

57 U. S. circuit court, 2d circuit & southern district of New York.

THE NATIONAL BANK OF THE REPUBLIC, OF New York,
vs.
THE BROOKLYN CITY AND NEWTOWN RAILROAD Company.

We hereby stipulate and agree that the issues in this cause be tried and determined by the court without a jury, and we hereby expressly waive a jury therein.

Dated New York, Nov. 24th, 1876.

FIELD & DEYO,
Def'ts' Att'ys.
RODMAN & ADAMS,
Pl'ff's Att'ys.

(Endorsed:) U. S. circuit court. The National Bank of the Republic vs. The Brooklyn City & Newtown Railroad. Consent to try
58 cause before court without a jury. Rodman & Adams, pl'ff's atty's. Filed Dec. 1, 1876.

59 United States circuit court, southern district of New York.

THE NATIONAL BANK OF THE REPUBLIC
ag'st
THE BROOKLYN CITY AND NEWTOWN RAILROAD Company.

WALLACE, J.:

The diversion of the note in suit by Hutchinson and Ingersoll cannot avail the defendants, the makers, because, within the authority of Swift vs. Tyson, 16 Peters, 1, the plaintiff having taken the note in good faith from Hutchinson and Ingersoll, though only as collateral to a pre-existing debt of the latter, cannot be affected by the equities between the antecedent parties.

It is useless to review or discuss the numerous cases which hold that where a note is thus taken as security, and there is no agreement, express or implied, from the circumstances, that the creditor is to forbear or extend the loan, he is not a holder for a valuable consideration, and cannot recover against the maker when the note has been fraud-
60 ulently put in circulation or diverted. It suffices to say that this is the conclusion reached in nearly all the cases in England and in this country where the question has arisen, and is in accord with the doctrine of courts of equity, that he who does not part with some new

consideration, or assume some new obligation, is not a purchaser for a valuable consideration, and has no better rights than the party from whom he purchases.

Text writers and commentators of very respectable authority have expressed the opinion that no new agreement between the creditor and the party transferring the paper is essential, for the reason that if such an agreement is not implied, at least there follows a remission of that vigilance which might otherwise have secured satisfaction of the debt, and because the acceptance of the security imposes new obligations on the part of the creditor towards the debtor. (Daniels on Neg. Inst's, § 816; Byles on Bills, 28; note by Judge Sharswood.)

Whether this reasoning is satisfactory or not, I shall not now stop to inquire. The case of Swift vs. Tyson was one where the bill was
61 taken in payment of a note held by the plaintiff against the person who transferred the bill, but no weight was placed upon the fact that plaintiff accepted the note in payment, and thus satisfied the original debt; and it has been generally accepted as committing the supreme court to the broad proposition that the new acceptance of negotiable paper as security entitled the holder to all the rights of a purchaser for a valuable consideration. (McBride vs. Farmers' Bank, 26 N. Y., 450; Atkinson vs. Brooks, 26 Ver., 569; Allaire vs. Hartshorne, 1 Zabriskie, 665; Gibson vs. Connor, 3 Georgia, 47; Fellows vs. Harris, 12 Sm. and M., 462; Blanchard vs. Stevens, 3 Cush., 162.)

Until a more decisive expression from that tribunal I must yield to the accepted import of that decision, and hold adversely to the position of the defendant.

It is insisted for the defendant that the judgment recovered in the suit brought by the plaintiff against the endorsers of the note in suit is a bar to this action against the maker. That suit was brought in the State court and decided, not upon any defence peculiar to the endorsers, but in accordance with the rules as held in this State, by which
62 the holder of a note who has taken it as security for a precedent debt, takes it subject to the equities existing between the prior parties. The simple question then is whether a judgment in favor of an endorser in an action by the holder of the note is an estoppel in an action brought against the maker where the defence is upon ground common to both the maker and endorser.

It would hardly be contended that a judgment in favor of the creditor against the principal would estop a surety from contesting the same issue when sued by the creditor. And it has been decided in several cases that a judgment in favor of the principal when sued by the creditor will not preclude a subsequent recovery by the creditor against the surety. (Townsend vs. Riddle, 2 New Hamp., 448; Bank of the State vs. Robinson, 8 English, 214; Barker vs. Cassidy, 16 Barb., 177.) Where there is no agreement, express or implied, from the nature of the contract, that a surety shall be bound by a suit against the principal, the surety is not affected by the result; he is in the position of a
63 stranger to the controversy. If the surety is not precluded by a judgment against the principal, the creditor is not, because estoppels must equally affect both parties. I entertain no doubt that the former suit is not a bar.

To the extent its payment operated as a satisfaction of the plaintiff's debt the defendants are entitled to be relieved; it has no other effect. The plaintiff is entitled to judgment for the amount of the debt unpaid for which the note in suit was taken as collateral.

For plaintiff, Messrs. Rodman and Adams.

For defendants, Messrs. Field and Deyo.

(Endorsed:) United States circuit court, southern district of New York. The National Bank of the Republic against the Brooklyn City and Newtown Railroad Company. Opinion. Wallace, J. Filed May 26, 1877.

64 United States circuit court, southern district of New York.

THE NATIONAL BANK OF THE REPUBLIC, OF New York,
vs.
THE BROOKLYN CITY & NEWTOWN RAILROAD Company.

This action having come on for trial at a term of this court held at the city of New York in & for the southern district of New York, commencing on the 3rd Monday in October, 1876, before the undersigned, the judge presiding, & a trial by jury having been waived by the within stipulation of the parties & the action tried before the court, I find and decide as follows:

First. That the facts set forth in the stipulation annexed, which is hereby referred to and made part of this finding, are true.

Second. That the defendant is indebted to the plaintiff upon the note described in the declaration in the sum of five thousand one hun-
65 dred & thirty-six dollars and sixty-eight cents, with interest thereon from the 31st day of November, 1876.

And as matter of law I decide that the plaintiff is entitled to judgment against the defendant for the sum of five thousand three hundred and nineteen and $\frac{43}{100}$ dollars with costs of suit. And judgment is ordered accordingly.

Dated May 24, 1877.

WM. J. WALLACE,
U. S. Dist. Judge.

(Endorsed:) U. S. circuit court, south'n dist. of New York. The National Bank of the Republic ag'st The Brooklyn City and Newtown Railroad Company. Order. Judgment for plaintiff. Wallace, J. C. L. D. No. 4, p. 125. U. S. circuit court. Filed May 26, 1877. John I. Davenport, clerk.

66 *Judgment.*

United States circuit court, southern district of New York.

THE NATIONAL BANK OF THE REPUBLIC, OF New York, plaintiff, *ag't* THE BROOKLYN CITY AND NEWTOWN RAILroad Company, defendant. } June 2, 1877.

This action having come on for trial at a term of this court held at the city of New York, in and for the southern district of New York, commencing on the 3d Monday in October, 1876, before Hon. William J. Wallace, the judge presiding, a trial by jury having been waived by the written stipulation of the parties and the action tried before the court, and the said judge having made and filed his findings and decision in

writing, hereto annexed, dated May 24th, 1877, whereby he finds in favor of the plaintiff against the defendant for the sum of five thousand three hundred and nineteen and $\frac{43}{100}$ dollars, and orders judgment therefor with costs:

67 Now, on motion of Rodman & Adams, plaintiff's attorneys, it is ordered and adjudged that The National Bank of the Republic, of New York, plaintiff, do recover of The Brooklyn City and Newtown Railroad Company, defendant in this action, the sum of five thousand three hundred and nineteen and $\frac{43}{100}$ dollars (5,319.43), with seven $\frac{23}{100}$ dollars (7.23) interest thereon from May 24, 1877, amounting together to the sum of five thousand three hundred and twenty-six dollars and sixty-six cents (5,326.66), besides thirty-one and $\frac{85}{100}$ dollars (31.85) costs as taxed, amounting in all to the sum of five thousand three hundred and fifty-eight dollars and fifty-one cents (5,358.51), and that said plaintiff have execution therefor.

Judgment signed this 2 day June, 1877.

J. M. DEULL,
Dep. Clerk.

(Endorsed:) U. S. circuit court. S. D. of N. Y. The National
68 Bank of the Republic vs. The Brooklyn City & Newtown R. R. Co. Judgment record. Rodman and Adams, pl'ff's att'y. U. S. circuit court. Filed Jun. 2, 1877. John I. Davenport, clerk. C. L. D. No. 4, p. 125.

69 *Bond for damages, costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

THE BROOKLYN CITY AND NEWTOWN RAILROAD COMPANY, plaintiff in error,
vs.
THE NATIONAL BANK OF THE REPUBLIC, OF New York, defendant in error.

Know all men by these presents, that we, The Brooklyn City and Newtown Railroad Company and Henry B. Hyde & H. M. Alexander, are held and firmly bound unto the above named The National Bank of the Republic, of New York, in the sum of twelve thousand dollars *dollars*, to be paid to the said The National Bank of the Republic, of New York, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the 9th day of July, in the year of our Lord one thousand eight hundred and 77.

Whereas the above named The Brooklyn City and Newtown Railroad Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above named The Brooklyn City and Newtown Railroad Company shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make their plea good, then this obligation

shall be void, otherwise the same shall be and remain in full force and virtue.

H. B. HYDE. [L. S.]
H. M. ALEXANDER. [L. S.]

{ SEAL OF B. CITY & NEWTOWN R. R. CO. } BROOKLYN CITY & NEWTOWN R. R. CO.,
By SAM'L HUTTON, *Pres't.*

Sealed and delivered and taken and acknowledged this 9th day of July, 1877, before me.

[L. S.] ALONZO A. FOSTER,
Notary Public for New York County.

70 UNITED STATES OF AMERICA,
Southern District of New York, ss :

H. B. Hyde & H. M. Alexander, being duly sworn, depose and say, each for himself, that he is worth the sum of twelve thousand dollars over and above all his just debts and liabilities.

H. B. HYDE. [L. S.]
H. M. ALEXANDER. [L. S.]

Sworn to this ninth day of July, A. D. 1877, before me.

[L. S.] ALONZO A. FOSTER,
Notary Public for New York County.

(Indorsed :) Vol , page . U. S. circuit court. The Brooklyn City and Newtown Railroad Company, plaintiff in error, vs. The National Bank of the Republic, of New York, defendant in error. Bond for damages and costs on appeal.

71 UNITED STATES OF AMERICA,
City and County of New York, Southern District of New York, ss :

On this 9th day of July, 1877, before me personally came Samuel Hutton, the president of the Brooklyn City and Newtown Railroad Company, to me known, who, being by me duly sworn, did depose and say that he resided in the city of Brooklyn, in the county of Kings, and State of New York; that he was the president of the Brooklyn City and Newtown Railroad Company; that he knew the corporate seal of the said company; that the seal affixed to the within instrument was such corporate seal; that it was so affixed by order of the board of directors of the said company, and that he signed his name thereto by the like order as president of said company.

In witness whereof I have hereunto set my hand and affixed my official seal this 9th day of July, A. D. 1877, at the city of New York aforesaid.

[L. S.] LEWIS HURST,
Notary Public, Kings County, New York.

72 (Indorsed :) U. S. circuit court. The Brooklyn City and Newtown R. R. Co. ag'st The National Bank of the Republic, of New York. Bond for damages and costs on appeal.

I approve the within bond as to form and sufficiency.
Dated August 11, 1877.

SAM'L BLATCHFORD.

Filed Aug. 11, 1877.

73 UNITED STATES OF AMERICA, *ss :*

To The National Bank of the Republic, of New York, greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The Brooklyn City and Newtown Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this eleventh day of August, in the year of our Lord one thousand eight hundred and seventy-seven.

SAM'L BLATCHFORD.

74 (Indorsed :) U. S. circuit court, southern district of New York. The Brooklyn City & Newtown Railroad Company, plaintiff in error, against The National Bank of the Republic, of New York, defendant in error. Citation. Field & Deyo, attorneys for pl'ff in error, 4 Pine street, N. Y. U. S. circuit court. Filed Aug. 14, 1877. John I. Davenport, clerk.

Service of the within is hereby admitted.

N. Y., August 14, 1877.

RODMAN & ADAMS,
Att'ys for Nat. B'k of Republic.

(Indorsement on cover :) No. 229. The Brooklyn City and Newtown Railroad Company, pl'ff in error, vs. The National Bank of the Republic, of New York. S. New York, C. C. U. S. Filed 5th October, 1877.

FILED
MAR 30 1880
D. W. MIDDLETON, Clerk.

Supreme Court of the United States.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE BROOKLYN CITY AND NEWTOWN RAILROAD COMPANY,
Plaintiff in Error,

against

THE NATIONAL BANK OF THE REPUBLIC OF NEW YORK.

Brief for the Plaintiff in Error.

STATEMENT.

1. The action was brought upon a promissory note made by The Brooklyn City and Newtown Railroad Company, dated May 9, 1873, at four months, for $5,000, payable to the order of Wm. V. LeCount, Treasurer.

2. The note was made by the Company without consideration, payable to the order of its treasurer, for the purpose of raising money upon it. It was indorsed by the treasurer, and indorsed again by Palmer & Co., a firm consisting of the President of the Company, Thomas Palmer, and its financial agent; Anson S. Palmer, both indorsements being without consideration.

3. The Company placed the note thus indorsed in the hands of the firm of Hutchison & Ingersoll, note brokers, *for sale* (fol. 48).

4. The firm of Hutchison & Ingersoll on June 19, 1873, borrowed from the National Bank of the Republic $36,000, and pledged as collateral security for the repayment of the loan a number of notes, among them the note in question. They had several times borrowed gross sums of money from the Bank upon specific amounts of collaterals, each transaction being a distinct and independent one, and they also borrowed in the same way from other persons and firms. They were never dealers with or customers of the Bank. They kept no account with it and the loan was obtained precisely as it might have been from any other corporation, firm or person willing to lend money upon security.

5. Before suit was brought, this loan had been paid in full out of the other collaterals.

7. On the eleventh day of July, 1873, the firm of Hutchison & Ingersoll borrowed from the plaintiff $10,000 upon another lot of collaterals. This loan was not paid in full.

8. On the 22d day of July, 1873, the firm of Hutchison & Ingersoll signed an agreement which was ante-dated, whereby they pledged all their collaterals for all their loans. This was after the $36,000 and the $10,000 loan had been made, and there was no agreement on the part of the Bank to extend either loan or to refrain from calling in either loan.

9. There were some pecuniary transactions between the Company and Hutchison & Ingersoll, which resulted in a balance due from the Company to Hutchison & Ingersoll on the 8th day of August, 1873, of $601. The Company then tendered to the firm that amount, and demanded a return of the note in suit. They then for the first time learned that the note had been pledged with the Bank and thereupon made a similar tender to and demand upon the Bank (fol. 51).

10. In November, 1874, the Bank sued Palmer & Co. as indorsers upon the note in the Supreme Court of the State of New York. They defended, not as indorsers, but upon the merits (fol. 62.) The action was referred to the Hon. Murray Hoffman, who decided that the plaintiffs were entitled to recover only the $601. Judgment for that amount, with interest and costs was entered, and the judgment was paid and satisfied (fols. 43, 44, 53.)

11. After this trial upon the merits, involving the amount due upon the note, and after having received the sum adjudged to be due and satisfying the judgment, the Bank brought this suit against the makers upon the same note.

12. The facts presented here are precisely the same as those presented in the suit in the New York Supreme Court against the indorsers, with the single exception that the printed agreement (already referred to), which was signed long after both loans had been made, is added to the proofs (fol. 36).

POINTS.

First.—The matter was "*res adjudicata.*"

That is, there had been a determination, by a Court of competent jurisdiction, upon the same subject matter in a controversy between the same parties or their privies.

1. There was the same plaintiff, but a different defendant, to wit: the maker instead of the indorser. Although the maker and indorser of a note may have independent interests, yet here the two are privies. The note never had any valid inception. The making and the indorsing were alike without consideration. There could be no liability on the

part of either maker or indorser, except such as might arise from the unauthorized action of Hutchinson and Ingersoll in pledging the note with the Bank.

The term "privies" is not confined to persons interested in real estate.

Tomlin's Law Dictionary enumerates among "*privies*," Vol. III., p. 218, "privies in respect of contract." There was here no contract save that which the law implies. That was that the makers would pay the note, and that the indorsers would guarantee that payment, *when the note fell into the hands of a bona fide holder for value.*

Bouvier defines "*privies*—" "persons who are partakers and have any interest in any action or thing, or any relation to another;" enumerating amongst others, "privies in respect to contracts."

2 Bouvier, 382.

2. It is not true that the same parties, *eo nomine*, only are bound by a judgment.

(*a*) Where a consignor and consignee have an equal right to sue a common carrier, a judgment against one of them who sues is a bar to an action by the other.

Green *v.* Clark, 5 Denio, 497.
S. C., 13 Barb., 57.

(*b*) A judgment in a suit brought by an agent is a bar to a suit for the same cause brought by the principal.

Kent *v.* Hud. R R.R. Co., 22 Barb., 278.
See also Taylor *v.* Spader, 48 N. Y., 664.

(*c*) The expression "parties" is not confined to the parties to the record. "It includes all those who have a direct interest in the subject matter of the suit."

Bates *v.* Stanton, 1 Duer, 87.
See Ehle *v.* Bingham, 7 Barb., 494.
Bun *v.* Bigler, 16 Abb., 183.

(*d*) In Sturdy *v.* Jackaway, 4 Wall., 174.

Mr. Justice Grier, in delivering the opinion, quotes the following language from Outram *v.* Morewood, 3 East., 356: "It is a well-settled principle of the common law 'that, in personal actions concerning debts, goods and effects (by way of distinction from other actions), a recovery in one action is a bar to another.' This principle is not true of personal actions alone, but is equally and universally true of all actions whatsoever; *quoad*, their subject matter; and that an allegation on record on which issue has once been taken and found is between the parties taking it and their privies conclusive to the judging thereof, so as to estop the parties respectively from again litigating that fact once tried and found."

Second.—Even if the judgment obtained in the Supreme Court of the State of New York, were not to be construed as "*res adjudicata*" in the strict sense, the Bank should have been held to be estopped from proceeding further with this action.

(1) It selected its own tribunal. It's suit was against the indorsers alone, it is true, but it was contested on the merits alone, and the Bank was defeated except as to the $601.

(2) The Bank did not appeal from the judgment, but abided by it, and accepted the money which the Court determined to be the whole amount due (not from the indorsers alone but *upon the note*), and then satisfied the judgment.

(3) Is it to be tolerated that the Bank can have a second trial upon the same question, because it is a banking association under the National Banking Law, and has the choice of suing either in the

State or Federal Courts? If it had first sued in the Federal Court, in an action precisely similar to the suit in the Supreme Court, and upon a similar trial, upon the merits, of the right to recover *upon the note*, had been awarded $601, against the indorser, *and had taken the money*, would this Court have entertained a second suit upon the same cause of action against the maker?

Kellogg *v.* United States, 1 Court of Claims (Nott & Hopkins), 310.
Kendall *v.* Stokes, 3 How. U. S., 87.
Mercer's Lessee *v.* Seldon, 17 Peters, 61.

Third.—The claim was extinguished by the acceptance of the sum adjudged to be due in the State Court, *without reservation* and the satisfaction of the judgment.

Daniel on Negotiable Instruments, vol. 2, p.
Woodworth *v.* Spofford, 2 McLean, 168.
Sedam *v.* Williams, 4 McLean, 51.
King *v.* Hoare, 13 Mees & W., 449.
Farrell *v.* Hibbard, 3 N. H., 318.

This case was tried upon similar pleadings, and upon precisely the same state of facts as the case in the State Court, with the single exception of the printed paper signed on the 22d day of July, 1873.

1. That paper would not have varied the result there, and in no way strengthens the case here. It was signed long after the making of both loans. There was no consideration for it. No action was taken upon it. The Bank did not agree to extend the loan, nor did it refrain from calling in the loan by reason of the paper.

2. It is the strongest possible evidence for the defense that there was no agreement or understanding that this note should apply to the second loan, and

that no custom to connect all collaterals with all loans existed. If there had been such an agreement, or such a custom had existed there would have been no use for such a paper.

Fourth.—The Bank of the Republic had no right to recover more than the $601, which was awarded them by the Supreme Court of the State of New York. In that case it conceded that under the decisions of the Courts of that State it could not recover unless it could show that the plaintiffs had a general lien upon all the securities of Hutchison & Ingersoll, termed in the decision a "*banker's lien.*"

I. The Bank was a "*banker,*" in the technical sense so far as *dealers* were concerned, but the relations with Hutchison were not those of banker and customer, and unless such relations subsisted, no lien could exist.

(*a*) Hutchison never was a depositor or dealer with the Bank. His only transactions were in borrowing on each occasion specific sums upon call and pledging for each several loan certain specific collaterals. Each transaction was as much isolated as if he had but a single transaction with the Bank, and a repetition of any number of such transactions cannot and does not affect the standing of either party, which was simply that of borrower and lender upon a pledge.

(*b*) Bouvier, in his Law Dictionary, defines "*A Banker*" as one engaged in the business of receiving other person's money on deposit to be returned on demand, discounting other persons' notes, and using his own for circulation; one who performs the business usually transacted by a bank; and he defines "*A Bank:*" 1. A place for the deposit of money. 2. An institution * * *

authorized to receive deposits of money, to lend money, and to issue promissory notes, usually known by the name of bank notes. 3. Banks are said to be of three kinds—of deposit, of discount, and of circulation ; they generally perform all these operations.

(*c*) Tomlins' Law Dictionary defines "*Bankers*" as "those private persons in whose hands money is deposited and lodged for safety, to be drawn out again as the owners have occasion for it."

(*d*) Webster defines "*Banking*" "the business of establishing a common fund for lending money, discounting notes, issuing bills, receiving deposits, collecting the money on notes deposited." * *

(*e*) The Revised Statutes (1 Ed. R. S. New York, 660), in the Act against unauthorized *banking*, say : "No person authorized by law shall subscribe to * * any associaton * * formed * * for the purpose of receiving deposits, making discount, *or* issuing notes or other evidences of debt to be loaned, &c., &c."

(*f*) The Act of Congress of 1866 defines a bank : "Every incorporated * * * having a place of business where credits are opened for the deposit or collection of money or currency subject to be paid upon draft, cheque or order."

(*g*) Grant on Bankers says : "The ordinary relation betwen banker and customer is this. The customer opens an accouut with the banker by paying a sum of money into the bank, the banker undertaking to hold himself liable for the payment of a like sum to the customers use * * * and also agreeing to honor or cash any cheques * * * to the extent of the sum deposited."

(*h*) Morse on Banking says : "It is of the essence of the business of banking that the bank or bankers should receive on deposits the money and funds of other persons." *Such persons he classes as customers.*

II.—In every case where the question of bankers' lien arises, the party claiming a banker's lien, was a banker under the foregoing definitions *quoad* the person from whom the security was acquired. That is the person *banked* with him. In some of the cases hereafter referred to, it is true a lien is claimed under special circumstances, just as any pledgee has a lien on any pledge, but no *banker's* lien can be shown to have arisen, except as above stated.

III.—The system of banking in England is quite different from ours. The banker is there the general financial agent of the customer. Even there the lien would not apply to a case like the present, *though the parties did actually occupy the legal relation of banker and customer.*

Davis *v.* Boscher, 5 T. R., 488.
Brandas *v.* Barnet, 12 Clark & Finelly.
Jones *v.* Peppercorn 1, Johnson (English), 430.
Bolland *v.* Bygrave, 1 Ryan & Moody, 271.
European Bank *in re* Agra Bank, 8 Eng. Chy. Appeals, 41.

Fifth.—Outside of the question as to the (asserted) specified lien of a "banker" the Bank could not recover.

McBride *v.* Farmers' Bank, 26 N. Y., 450.
S. C. 25 Barb., 657.
Van Namee *v.* Bank of Troy, 8 Barb., 312.
Neponset Bank *v.* Leland, 5 Met., 259.
Story on Agency, §381.
Parsons on Contracts, vol. 2, p. 104.
West *v.* Am. Ex. Bank, 44 Barb., 175.
Am. Ex. Bank *v.* Corlies, 46 Barb., 19.
Farrington *v.* Franklin Bank, 24 Barb., 559.
Commercial Bank *a.* Marine Bank, 3 Keys, 337.
Scott *a.* Ocean Bank, 23 N. Y., 293.
Ray *a.* Coddington, 20 John., 637.
Lawrence *a.* Clarke, 36 N. Y., 118.

Sixth.—The Bank relied upon the decision in Swift *v.* Tyson, 16 Peters, 1.

1. An examination of the facts (pp. 2 and 3), will show that the acceptance sued upon there was, with another acceptance, given *in payment of* a promissory note, and that the note *was given up* when the acceptances were received. All then that was decided is, that an innocent third party may acquire a title to a note if he takes it in *payment of* a pre-existing debt as well as if he makes an immediate advance upon it.

2. But conceding, for the purposes of the argument, that a party receiving a note as additional security to a claim already existing may recover upon the note, this is not such a case.

The note was not given as security for a pre-existing debt. It was given as security for a loan, and the loan has been paid, and the right of recovery cannot be extended to the case of a subsequent and independent loan made upon different collaterals.

3. All the other cases cited were those of continuing loans or balances. In other words, the party holding the notes had done or omitted to do some act on the faith thereof.

Here there was no agreement to extend the second loan.

Seventh.—An examination of Swift *agst.* Tyson shows that the point was taken on the argument that "the acceptance of the bill of exchange by the defendant having been given in New York, the contract was to be regulated by the laws of that State." The reporter says: "this question was not brought before the Court by the certificate of division."

In the case at bar the question is clearly presented, and, inasmuch as these parties are both resi-

dents of New York, and the contract was made there, and the complainant resorted to the tribunals of that State for the assertion of his rights, and obtained a judgment upon which he received payment, and gave satisfaction, we suggest that the case should be determined with sole reference to the *lex loci contractus*, and that this Court should accept the decisions of the Courts of the State of New York as governing this case.

Eighth.—The judgment below should be reversed and judgment rendered for the Company, or a new trial should be ordered.

FIELD & DEYO,

Attorneys for the Plaintiffs in Error.

WILLIAM DORSHEIMER,

Counsel.

FILED
MAR 25 1880
D. W. MIDDLETON, CLK

United States Supreme Court.

THE BROOKLYN CITY & NEWTOWN RAILROAD COMPANY

Plaintiff in Error,

vs.

THE NATIONAL BANK OF THE REPUBLIC OF NEW YORK,

Defendant in Error.

STATEMENT OF CASE AND POINTS FOR DEFENDANT IN ERROR.

THOS. H. RODMAN,
Of Counsel for Defendant in Error.

U. S. Supreme Court.

THE BROOKLYN CITY AND NEWTOWN RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE NATIONAL BANK OF THE REPUBLIC OF NEW YORK,
Defendant in Error.

Statement of the National Bank of the Republic of New York, plaintiff (defendant in error here), on writ of error brought by the Brooklyn City and Newtown Railroad Company defendant (plaintiff in error here) to review a judgment of the Circuit Court of the United States for the Southern District of New York.

The action was tried before Judge Wallace without a jury by consent of parties and upon an agreed statement of facts found at page 15 of the record. It was brought to recover upon a promissory note dated May 9, 1873, for $5,000, payable September 12, 1873, made by the plaintiff in error a corporation of New York to the order of and indorsed by William V. LeCount, treasurer of the corporation, payable four months after date, and judgment was rendered against the makers for $5,136.68 (fo. 65).

In a prior action in the Supreme Court of New York by the same plaintiff against Palmer & Co., who had also indorsed the note, the plaintiff had re-

covered judgment for $601 damages and costs, which had been paid and the judgment satisfied (fo. 53).

From October, 1872, to July 11th, 1873, the National Bank of the Republic of New- York had made twelve separate call loans on collaterals to Hutchinson & Ingersoll note brokers of New York (p. 16). The two last loans were respectively for $36,000 on the 19th of June, and $10,000 on the 11th of July 1873. All the other loans had been paid prior to the 19th of June. The note in suit was originally pledged, among other collaterals, for the loan of $36,000.

On the 22d July, 1873, Howes Hyatt & Co., the makers of two notes, one for $2,605.98 and the other for $3,540.15, which formed part of the collaterals of the $10,000 loan, failed.

The first payment made on the $36,000 loan was $4,580, and was made on the day of that failure, viz.: July 22d, 1873. The last payment on that loan was made on the 4th April, 1874. That repaid the loan in full and left the note in suit in the bank's possession. So that, on the 22d July, 1873, when Howes, Hyatt & Co. failed, the bank held the note in suit as collateral for the loan of $36,000, which at that time appears to have been wholly unpaid.

On that day, July 22d, 1873 (whether before or after that first payment of $4,580 on the $36,000 loan does not appear), the borrowers, Hutchinson & Ingersoll, in writing, pledged *all their securities in possession of the bank for any and all of their present or future liabilities to the bank* (p. 17). The instrument was dated back to the 19th June, 1873, the date of the $36,000 loan, which, together with the $10,000 loan of the 11th July, as above stated, was then outstanding, and those were the only loans left.

At that time the bank had no notice of the circumstances attending the making or indorsing of the note in suit, or of its purpose, or of any relations between Hutchinson & Ingersoll and the other parties to it, and no notice that it was other than business paper or that there was any question about

Hutchinson & Ingersoll's right to hypothecate it (fo. 51). The cash proceeds of the collaterals of the $36,000 loan on the 4th April, 1874, exceeded it $2,403.61. After crediting that sum to the deficiency on the $10,000 loan, the final balance of that loan on the 4th of April 1874 was $5,906.99. After applying to that balance the proceeds of the judgment recovered and collected by the plaintiffs from Palmer & Co. the indorsers of the note in suit, the amount due the plaintiffs at the time of the trial of this action, and for which the judgment below was recovered, was $5,136.68.

Hutchinson & Ingersoll at the time of the trial were insolvent. They had received this note from the railroad company, indorsed by Palmer & Co., for sale (fo. 48). On the 8th August 1873 there was a balance of $600 due to Hutchinson & Ingersoll by the railroad company for advances made by the brokers. That amount was then tendered to the latter and this note demanded from them as well as from the plaintiffs. In the suit of the plaintiffs in the State Court against Palmer & Co. as indorsers of this paper, the Referee gave judgment in the plaintiffs' favor for that balance of advances, $601 (fo. 36), upon the ground that to that extent Hutchinson & Ingersoll could enforce the paper against the railroad company, and therefore the bank could recover to that but to no greater extent.

Points of Defendant in Error.

Point I.

On the 22d July 1873 the bank, by virtue of the terms of the loan of $36,000, held the note in suit as collateral to that loan, which had been made on the faith of it and of other paper (fol. 50). They continued such holders until April 4, 1874; for it was

covered judgment for $601 damages and costs, which had been paid and the judgment satisfied (fo. 53).

From October, 1872, to July 11th, 1873, the National Bank of the Republic of New-York had made twelve separate call loans on collaterals to Hutchinson & Ingersoll note brokers of New York (p. 16). The two last loans were respectively for $36,000 on the 19th of June, and $10,000 on the 11th of July 1873. All the other loans had been paid prior to the 19th of June. The note in suit was originally pledged, among other collaterals, for the loan of $36,000.

On the 22d July, 1873, Howes Hyatt & Co., the makers of two notes, one for $2,605.98 and the other for $3,540.15, which formed part of the collaterals of the $10,000 loan, failed.

The first payment made on the $36,000 loan was $4,580, and was made on the day of that failure, viz.: July 22d, 1873. The last payment on that loan was made on the 4th April, 1874. That repaid the loan in full and left the note in suit in the bank's possession. So that, on the 22d July, 1873, when Howes, Hyatt & Co. failed, the bank held the note in suit as collateral for the loan of $36,000, which at that time appears to have been wholly unpaid.

On that day, July 22d, 1873 (whether before or after that first payment of $4,580 on the $36,000 loan does not appear), the borrowers, Hutchinson & Ingersoll, in writing, pledged *all their securities in possession of the bank for any and all of their present or future liabilities to the bank* (p. 17). The instrument was dated back to the 19th June, 1873, the date of the $36,000 loan, which, together with the $10,000 loan of the 11th July, as above stated, was then outstanding, and those were the only loans left.

At that time the bank had no notice of the circumstances attending the making or indorsing of the note in suit, or of its purpose, or of any relations between Hutchinson & Ingersoll and the other parties to it, and no notice that it was other than business paper or that there was any question about

Hutchinson & Ingersoll's right to hypothecate it (fo. 51). The cash proceeds of the collaterals of the $36,000 loan on the 4th April, 1874, exceeded it $2,403.61. After crediting that sum to the deficiency on the $10,000 loan, the final balance of that loan on the 4th of April 1874 was $5,906.99. After applying to that balance the proceeds of the judgment recovered and collected by the plaintiffs from Palmer & Co. the indorsers of the note in suit, the amount due the plaintiffs at the time of the trial of this action, and for which the judgment below was recovered, was $5,136.68.

Hutchinson & Ingersoll at the time of the trial were insolvent. They had received this note from the railroad company, indorsed by Palmer & Co., for sale (fo. 48). On the 8th August 1873 there was a balance of $600 due to Hutchinson & Ingersoll by the railroad company for advances made by the brokers. That amount was then tendered to the latter and this note demanded from them as well as from the plaintiffs. In the suit of the plaintiffs in the State Court against Palmer & Co. as indorsers of this paper, the Referee gave judgment in the plaintiffs' favor for that balance of advances, $601 (fo. 36), upon the ground that to that extent Hutchinson & Ingersoll could enforce the paper against the railroad company, and therefore the bank could recover to that but to no greater extent.

Points of Defendant in Error.

Point I.

On the 22d July 1873 the bank, by virtue of the terms of the loan of $36,000, held the note in suit as collateral to that loan, which had been made on the faith of it and of other paper (fol. 50). They continued such holders until April 4, 1874; for it was

not until that date that the last payment on that loan was made (fol. 52). The written pledge by Hutchinson & Ingersoll of all their securities, including that note (fol. 54), for all their indebtedness to the bank, was cotemporaneous with the failure of Howes, Hyatt & Co. whose bankrupt paper formed half of the nominal security for the $10,000 loan, for that loan was made on the 11th July, and Howes, Hyatt & Co. must have failed between that date and the 22d July (fol. 50). That was a good reason for the bank's request for the written pledge, and Hutchinson & Ingersoll acceded to the request.

The case shows that the bank then had no reason to believe the note in suit was not ordinary business paper, which Hutchinson & Ingersoll had the right to hypothecate.

The bank, by that written pledge, became a *bona fide holder* of the note in suit as collateral to the $10,000 loan, as it was already collateral to the $36,000 loan; and both were call loans.

The doctrine of *Swift vs. Tyson* (*16 Peters, 1*) is decisive. The criticism that the doctrine pronounced there, so far as it applies to paper given as security for an antecedent debt, is *obiter*, because the case there shows that the plaintiff had given up a draft of his debtors for the acceptance of their draft in suit, does not accord with subsequent cases in this Court, nor with the construction of that decision by either the State Courts that have adopted or those that have rejected the doctrine of Judge Story's opinion in regard to paper taken as security for a debt.

The principle declared in *Swift vs. Tyson* (*p. 20*) was, first, that a preëxisting debt was a valuable consideration; second, that the interests of commerce demanded that the fullest credit and freest circulation should be given to negotiable paper, so "that it should not only pass as security "for new purchases and advances made upon the "transfer thereof; but also in payment of, and as "security for, old debts." * * * * * "Prob-

ably," the Court said, "one-half of all bank trans-"actions in our country, as well as those of other "countries, are of this nature" (that is, renewals of old debts).

It is safe to say that the doctrine laid down by Justice Story, in *16 Peters*, has been ever since accepted by text-writers and Judges of the highest State Courts, both those that have followed the rule of this Court, and those that have refused to follow it, as the doctrine of this Court. So the Circuit Judge held.

This Court, in *McCarty vs. Roots* (20 Howard, 432), expressly reaffirmed it. There the Circuit Court had sustained a demurrer to a plea by the maker of a promissory note, that the only consideration between the plaintiff and the holder of a promissory note was a preëxisting debt, for which the holder had transferred the note as *collateral security*. Justice McLean, delivering the unanimous opinion of the Court, said: "That, under the decision of "*Swift vs. Tyson*, was legal. The demurrer was "properly sustained."

No argument in favor of the rule can be added to that of the Court in *Swift vs. Tyson*. The opinions of the many State Courts that have followed that case are repetitions, amplifications or illustrations of the principles there laid down.

The opinion of Judge Wallace in respect to this point, as printed, does not seem quite clear. If he meant to say that the doctrine that a party who takes a promissory note of a third person from his debtor as security for an existing debt is not a purchaser for value unless he expressly agrees to forbear payment or extend his loan, is held in nearly all the English as well as American cases; we submit that the proposition is directly opposed to that of the opinion of this Court in *Swift vs. Tyson*, as to the history of the question, and we think cannot be sustained by the decided cases since.

Justice Story says, *Swift vs. Tyson* (p. 21): "From the time of Lord Mansfield (*Pillans vs. Van "Mierop*, 3 Burr, 1664) there is not *a single case to "be found in England* in which it has ever been "held by the Court that a preëxisting debt was not "a valuable consideration sufficient to protect the "holder within the meaning of the general rule, "although there are incidental dicta to the con- "trary."

Again he says: "In the American Courts the "same doctrine seems generally, but not univer- "sally to prevail." And he said it then prevailed in Connecticut, Massachusetts, Maine and New Hampshire. In that opinion the distinction between taking a note in payment or as security was ignored by this Court, as we have seen it has been since.

The doctrine of *Swift vs. Tyson* has since been applied in the following cases in the States:

Quinn vs. Hard, 43 Vermont, 375.
Russell vs. Splater, 47 *Id.*, 273.
Atkinson vs. Brooks, 26 *Id.*, 569.
Fisher vs. Fisher, 98 Mass., 303.
Stoddard vs. Kimball, 6 Cush., 469.
Roberts vs. Hall, 37 Conn., 205.
Bank of Republic vs. Carrington, 5 R. I., 515.
Bowman vs. Millison, 58 Ill., 36.
Manning vs. McClure, 36 *Id.*, 490.
Payne vs. Beasley, 8 Cal., 260.
Geovanovich vs. Citizens' Bank, 26 La, An., 15.
Smith vs. Isaacs, 23 *Id.*, 454.
Partridge vs. Smith, 21 Bissell, 183.
Armour vs. McMichael, 36 New Jersey, 92.
Maitland vs. Citizens' Bank, 40 Maryland, 540.
Robins vs. Lair, 31 Iowa, 9.
Bonand vs. Genesi, 42 Ga., 639.
Allaire vs. Hartshorne, 1 Zabriskie, 665.

The Supreme Court of Connecticut (29 Conn., 477) say, as to the distinction between the rights of a party taking paper in payment and as security: "If such a question as this was put to any man not

"in the habit of being controlled by precedents or "of reasoning upon technical principles, it would "seem that the only answer would be, *that there was* "*no such distinction.* Such a man would hardly be "expected to perceive any good reason why he "should be allowed to take paper in payment of a "debt, and at the same time be denied the right to "take the same paper as security for its future pay- "ment. And if we refer to the legal reason for "holding parties to negotiable paper liable to third "third persons who have taken it in the course of "trade it seems to be of equal force, whether re- "ceived in payment or as security for a debt. Ne- "gotiable paper which passes by delivery is treat- "ed as *a species of money* which the necessities of "trade require, and therefore render current, and "which *is subjected to the same rules as the money* "*it represents.*"

After referring to the contrary rule in New York, the opinion continues: "We think, however, that "the weight of authority is the other way, and "accords with what we regard as the good sense of "the matter. *We have not been referred to an* "*English case in which such a distinction is made,* "and we suppose the law in England to be well "settled in accordance with our views.

* * * * * * * * * *

"To the same effect was the decision of the "Supreme Court of the United States in the case of "*Swift vs. Tyson* (16 *Pet.*)"

In *Atkinson vs. Brooks* (26 *Vermont,* 576), the Court say, as to giving collateral security: "One would scarcely part with such security *unless he expected more or less indulgence on account of it; and when the prior debt is suffered to remain uncollected, it is, under the circumstances, fair to conclude such was the stipulation.* And the case of one who takes a note or bill so negotiated, *whether in payment or as security for a prior debt,* impliedly stipulates to forego the collection until the maturity of the collateral paper when such proves unproductive, is the same in both

alternatives. In either case he may pursue his remedy upon the negotiable paper against the prior parties, including his immediate indorser; or, omitting him, he may pursue the other parties to the bill or note, and sue his original debt equally, whether he took the paper in payment or as collateral security of such debt. So that the difference between the two cases is merely formal.

"And if in case of negotiating current paper as collateral security for a prior debt, the holder is not regarded as having taken it upon a valuable consideration, then the indorser may recall it at will. For, if there is no such consideration as to make the contract binding, it is revocable at will."

That Court, too, declares this to be settled law in England, citing *Poirier vs. Morris, 20 L. & E., 103; 22 Law J. N. S.; 22 B., 313; 2 El. & Bl., 89*, May, 1853, as the latest English leading case—and they say also that this Court, in *Swift vs. Tyson*, adopted the English rule "upon general principles of commercial law."

They say what is equally true that the New York Courts discard the distinction between taking paper in payment and as security, and that so far the doctrine is sound, for "there is obviously no difference."

In *Payne vs. Beasley* (*8 Cal., 260*), the Court expressed its approval of the doctrine of *Swift vs. Tyson*, as Chancellor Kent did in his commentaries (*3 Kent, 300, Note A*), but avoided deciding the question, by holding that under the local law, if the creditor had not taken the collateral, he *might have attached*, and *the loss of that right made him a bona fide holder*. As the Circuit Judge in this case says, there was such *a remission of the creditor's vigilance* as entitled him to the right of a *bona fide* holder.

In *Manning vs. McClure* (*36 Ill., 494*), the Court considered that Justice Catron having, in *Swift vs. Tyson*, "challenged the attention of the Court," the language of Justice Story "cannot be consid-

" ered as inadvertently used and may be regarded " as receiving the implied assent of the Court, with " the exception of the Judge named." The Court in Illinois, in that case, abandoned the attempt to decide the point upon authority, and then decided it upon grounds of reason and experience. They held that in the absence of an express agreement, *there must be an implied one for forbearance at least.* "Having," they say, "received the securities, the " creditor believes himself safe. He is lulled into " quiet and neglects to take such steps to procure " payment of his debt as prudence would have re- " quired but for the fancied securities in his hands."

In *Maitland vs. Citizens' National Bank of Baltimore* (*40 Md., 187*), the Court elaborately discusses the question and concurs with Justice Story—and further says the doctrine has been mooted in this Court upon the theory that his opinion was *obiter* as to a holder of collateral. But the Court says that in *Goodman vs. Simonds* (*20 How., 343*), the question was much discussed, and although the case did not require the expression of a direct opinion, it is not difficult to see what the inclination of the mind of the Court was; and that they took care to fortify the former decision by showing that it accords with those in England and many here. They further say that the precise question was so decided in *McCarty vs. Roots*, *21 How., 432, 439*, on the authority of *Swift vs. Tyson*.

In New York, from the leading case of *Coddington vs. Bay* (*20 John., 637*), down to *McBride vs. Farmers' Bank* (*26 N. Y., 450*), the distinction between taking paper in payment of or was collateral to an antecedent debt has been expressly discarded; and the decision of this Court in *Swift vs. Tyson* uniformly conceded to have covered both classes of cases alike (*26 N. Y., 454*).

In *Allaire vs. Hartshorne* (21 N. J., 667), the Court states that the second error relied on for a reversal involved two questions, one of which was, "whether the plaintiff, having received the note as

collateral security for a precedent debt, is deprived of the character of a *bona fide* holder for value, and of the rights and immunities which that character confers," and they say, "We are of the opinion that both questions must be answered in the negative." They add, "The first point was fully discussed and satisfactorily *settled* (*if any doubt respecting it previously existed*) by the Supreme Court of the United States in the case of *Swift vs. Tyson* (16 Pet., 1), and quote quite largely from that part of Judge Story's opinion which decides that receiving a note in payment of or as security for a precedent debt is according to the known ordinary course of trade and business; and in which Judge Story also declares that the question had then been several times before this Court, where it had been uniformly held that the distinction was immaterial, because, "in either case, the holder equally gives credit to the instrument;" that "in England the same doctrine had been uniformly acted upon." Chief Justice Green concludes, p. 668: "In the soundness of the rule, as well as in the general course of reasoning by which it is sustained, we entirely concur. It is sustained, moreover, by the weight of authority."

Point II.

The agreed case (fol. 50) contains a finding that *no agreement* was made to extend *the loan of $36,000*, or to refrain from calling it in.

There is no finding at all as to whether it was or was not agreed that the *$10,000 loan* should stand. It was that loan, one-half the collaterals of which had become bankrupt paper, that the parties to the loan on the 22d July agreed to and in effect did secure. Then, as stated, the note in suit was already pledged for the $36,000 loan, and remained pledged until that loan was fully paid in April, 1874. It is plain that the loan of $36,000 was not called at all; but was paid (fol. 52) out of the collaterals given to

secure it, exclusively of the note in suit, but not until April, 1874.

It is equally apparent that the $10,000 loan was never called after the written pledge of July 22d, 1873, was given. What the plaintiff has received for that has been the proceeds of its collaterals as far as they would go (fol. 52), together with $601 collected upon the judgment against Palmer & Co., the indorsers of the note in suit.

The fact that plaintiff did not press for payment after their request for the written pledge had been complied with, is evidence that Hutchinson & Ingersoll were not to be pressed. It is a fair inference, and therefore fairly covered by the conceded facts of the case, and the judgment of the Court. In the absence of a finding that there was no agreement that the $10,000 should stand, the Court, in aid of the judgment, will infer that there was such an agreement or understanding; because none other is reasonably inferable from the acts of the parties.

U. S. vs. Pugh, 9 Otto, 265.

SUB. 1. The fact that the contract was made in New York, where the contrary rule prevails, makes no difference.

Swift vs. Tyson, 16 Peters, 1.
Town of Pine Grove vs. Talcott, 19 Wall., 666.

Point III.

Plaintiffs, as bankers, had the right, irrespective of the written pledge of June 19th, 1873, to hold the note in suit for the deficiency on the second loan. They are a national bank, and were doing business as such, as alleged in complaint (fol. 15). Hutchinson & Ingersoll kept no bank account there, but they were in the habit of borrowing money from the bank on collaterals. Their loans amounted, in 1872 and 1873, to over $180,000 (fol 49).

Those who loan money on security, as well as those who receive deposits, are bankers.

Warren vs. Shook, 1 Otto, 91.

In England it seems to be settled that a banker has a lien for a general balance.

In re European Bank, 8 L. R. Chan. Appeals, 41.

Morse on Banking, 45, 2d ed.

In 8 L. R. there was a loan account, a discount account and a general account; and the loan account, being satisfied, certain bills of exchange, pledged as *collateral for it*, were held liable to be retained for the general balance.

The general lien is not excluded by the special contract, unless the special contract be inconsistent with it.

Jones vs. Peppercorn, Johnson, 430; Sir W. P. Wood, V. C.

Sir W. P. Wood says *Brandao vs. Barnet* (*12 Cl. & Fin., 787*) "comprises the whole of the law on this subject" (*Id.*, 439).

Davis vs. Bowsher (*5 Term., 488*), the Vice-Chancellor says, was not dissented from in *Brandao vs. Barnet*, and was the strongest case for the general lien, for there the banker advanced upon part of certain bills of third persons sent to him to select from, and declined to advance on all. Yet the Court (Lord Kenyon) held the bankers could hold all the bills for that advance.

In *Bolland vs. Bygrave* (*1 Ry. & Mood, 273*), Lord Tenterden held "that a banker who stands in this "relation to his customer has a lien on any securi-"ties of that customer which may for any purpose "be placed in his hands."

In *Jones vs. Peppercorn*, the defendants were brokers with whom Strahan, Paul & Co., who were bankers, had pledged India bonds belonging to the plaintiff for advances made by defendants, and

the question was whether the defendants had a lien on the bonds or their proceeds, or the surplus thereof, for a general balance or only for the present advance; and the Vice-Chancellor held that there was a general lien. "So long," he says, "as cus- "tomers leave it in the power of their bankers to "deal with their property as they see fit, if the "bankers actually deal with it as their own, in the "absence of notice to the parties with whom they "so deal, I can only regard it, as between the cus- "tomers and such parties, as the property of the "bankers."

Where a banker receives bills and securities from his customer to meet advances made from time to time, the banker has a general lien thereon for all his advances.

Ex parte Bloxham, 8 Ves., 531.
Approved Stalker vs. McDonald, 6 Hill, 106.
Bosanquet vs. Deedman, 1 Starkie, 1.
Approved, 6 Hill.

Point IV.

The defense of a former recovery is not tenable.

The former judgment was not in a suit between the same parties or their privies.

There is no privity between principal and surety, maker and indorser, and the like, to which the doctrine of estoppel applies.

Bigelow on Estoppel, 75, 2d edition.

Judgment against the indorser does not discharge the maker.

Russell & Irving Manuf'g Co. vs. Carpenter, 5 Hun, N. Y. Supreme Court, 162.
Pritchard vs. Hitchcock, 6 Man. & Gr., 151; cited by Bigelow, 75.

There plaintiff sued defendant as guarantor of the acceptor of a bill of exchange. The latter

pleaded payment. The fact was that the acceptor, when insolvent, had paid the plaintiff the amount of the bill; but his assignee had recovered it back. The guarantor, now sued, contended that the payment by the acceptor was a satisfaction. Plaintiff urged that the recovery by the assignee was conclusive evidence against the guarantor, that they were entitled to the money, and this being so, the debt was not satisfied. The Court held the judgment to be evidence, but not conclusive.

Bigelow (p. 75), citing the case, says: "The de- "cision shows that in the relation of *guarantor* "and *principal no privity of estoppel arises;* and "the same is true of the relation of principal and "surety, co-sureties, Sheriff and deputy, and the "like cases, where parties are answerable over." *Maker and indorser is such a case.* In case of *joint* and *several* promissors and joint *trespassers*, judgment against one does not bar the right of action against the rest.

Id., 62, and cases cited.
Leckmire vs. Fletcher, 1 Cromp. & Mees, 623.
Streehy vs. Mandeville, 6 Cranch, 265.

As a general if not universal principle an action and judgment between two persons shall not bind or affect a third person, who could not be admitted to make a defense, to examine witnesses, or to appeal from the judgment.

Id., 67, citing Jones vs. Oswald.
2 Bailey.
1 Greenleaf's Evidence, § 535.

In 2 Bailey held, a recovery in assumpsit against the Sheriff for money had and received in his official capacity, no bar to an action against his sureties for the same money.

The rule is that a judgment is conclusive, not only as to parties, but to those *claiming under them.* "That phrase," says Judge Cowen, in *Douglass vs. Howland* (24 Wend., p. 52), "very nearly ex-

"presses the meaning of the word *privy* when "used to signify those persons off the record who "may be affected to the same extent as if they "were parties."

That rule cannot be invoked here.

A judgment against an executor is not conclusive against a devisee of the existence of a debt.

Marshall, C. J.; Alston vs. Mumford, 1 Brock., 266.

In an action of trover a judgment in favor of the defendant, recovered by him in a replevin suit against the plaintiff's servant for same property, was held inadmissible, on the ground that plaintiff was neither party nor privy to the former suit.

Alexander vs. Taylor (4 Den., 302):

"The reason," Mr. Bigelow says, "is that the de- "fendant claimed the property under a judgment "of his own, against the plaintiff's servant in a "suit in which the plaintiff had no part." The *principle* is, that a man shall be heard before he is condemned. If it were otherwise, a judgment could always be allowed to go against an indemnitor and he would be without remedy unless he could prove fraud or collusion.

In *Drummond vs. Prestman* (12 Wheat., 515) the record of a judgment against the principal was held admissible *inter alia* in a suit against his guarantor; but the Court says, p. 523: "If the attempt were "made to introduce the record as *final and conclu-* "*sive*, it was properly rejected."

A surety for a debt without any agreement, express or implied, to be bound by a suit against the principal party is at common law, no more affected by its event, if against him, than a mere stranger.

Thomas vs. Hubbell, 15 N. Y., 405.

SUB. 1. Estoppels must be mutual.

1 Greenleaf's Ev., 524.

Unless the defendants here would have been concluded, had the judgment in the suit against the indorsers been for the full amount, the plaintiffs are not concluded by the judgment against the indorsers in the State Court for a portion of their demand. No authority, we believe, can be found sustaining the position that the defendants would have been so concluded.

Again, if the first suit had been against the makers and judgment had been for the whole amount, would that have estopped the indorsers, had this suit been against them? The law, we submit, is to the contrary, and is based upon the principle that a man shall not be condemned unheard.

Douglas vs. Howland, 24 Wend., 35.

There held that a decree against the principal in case of a bill to compel an account is not evidence against the guarantor, unless he had notice of the suit and an opportunity to defend in the name of his principal.

Point V.

It cannot be maintained that the plaintiff's claim was satisfied by the payment of the judgment against the indorsers for part only of the debt. What the law means by satisfaction of a debt upon execution against another party severally liable is real satisfaction. Therefore, taking the body of such other party in execution merely is not satisfaction.

Porter vs. Ingraham, 10 Mass., 88.

Part payment from and release of indorser does not discharge maker.

Story on Prom. Notes, § 422, Note 2.
Commercial Bank vs. Cunningham, 24 Pick., 270–4.

Release of subsequent indorser does not discharge prior one.

Story, § 423.

The principle is that it benefits and cannot injure any other party to have his liability diminished.
Id., § 422.

Judgment unsatisfied against indorser is no bar to action against maker.
Russell & Irwin Manf'g Co. vs. Carpenter, 5 Hun, 162.

The collection of part of a demand in execution against one of several, who were severally liable, would not be a satisfaction of the debt in a suit for the balance against another. It would be a satisfaction *pro tanto*. That is this case.

The real justice of the case required payment of the whole debt by one or both of the parties to the note, and the makers can with no more justice defeat the plaintiff's claim than if the indorsers had *voluntarily* paid the $601, and had obtained a release of their liability for the whole.

An estoppel is applied to promote, not to defeat, the ends of justice.

It is a novel proposition that part payment of a debt by a surety or indorser and his discharge discharges the principal.

It seems to be a proposition to reverse a fundamental principle.

Point VI.

If the practice in New York controls here (§ 914, R. S., U. S.), there being no exception to the decision of the Circuit Court, there is nothing here to review.
Weed vs. N. Y. & Harlem R. R. Co., 29 N. Y., 616.
Hunt vs. Bloomer, 3 Kernan, 341.

We respectfully submit that judgment should be affirmed.

THOS H. RODMAN,
Of Counsel for Defendant in Error.

Unless the defendants here would have been concluded, had the judgment in the suit against the indorsers been for the full amount, the plaintiffs are not concluded by the judgment against the indorsers in the State Court for a portion of their demand. No authority, we believe, can be found sustaining the position that the defendants would have been so concluded.

Again, if the first suit had been against the makers and judgment had been for the whole amount, would that have estopped the indorsers, had this suit been against them? The law, we submit, is to the contrary, and is based upon the principle that a man shall not be condemned unheard.

Douglas vs. Howland, 24 Wend., 35.

There held that a decree against the principal in case of a bill to compel an account is not evidence against the guarantor, unless he had notice of the suit and an opportunity to defend in the name of his principal.

Point V.

It cannot be maintained that the plaintiff's claim was satisfied by the payment of the judgment against the indorsers for part only of the debt. What the law means by satisfaction of a debt upon execution against another party severally liable is real satisfaction. Therefore, taking the body of such other party in execution merely is not satisfaction.

Porter vs. Ingraham, 10 Mass., 88.

Part payment from and release of indorser does not discharge maker.

Story on Prom. Notes, § 422, Note 2.
Commercial Bank vs. Cunningham, 24 Pick., 270–4.

Release of subsequent indorser does not discharge prior one.

Story, § 423.

The principle is that it benefits and cannot injure any other party to have his liability diminished.
Id., § 422.

Judgment unsatisfied against indorser is no bar to action against maker.
Russell & Irwin Manf'g Co. vs. Carpenter, 5 Hun, 162.

The collection of part of a demand in execution against one of several, who were severally liable, would not be a satisfaction of the debt in a suit for the balance against another. It would be a satisfaction *pro tanto*. That is this case.

The real justice of the case required payment of the whole debt by one or both of the parties to the note, and the makers can with no more justice defeat the plaintiff's claim than if the indorsers had *voluntarily* paid the $601, and had obtained a release of their liability for the whole.

An estoppel is applied to promote, not to defeat, the ends of justice.

It is a novel proposition that part payment of a debt by a surety or indorser and his discharge discharges the principal.

It seems to be a proposition to reverse a fundamental principle.

Point VI.

If the practice in New York controls here (§ 914, R. S., U. S.), there being no exception to the decision of the Circuit Court, there is nothing here to review.
Weed vs. N. Y. & Harlem R. R. Co., 29 N. Y., 616.
Hunt vs. Bloomer, 3 Kernan, 341.

We respectfully submit that judgment should be affirmed.

THOS H. RODMAN,
Of Counsel for Defendant in Error.